IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

REPLY BRIEF ON MOTION TO QUASH.

I.

MOTION TO QUASH WRIT OF CERTIORARI IS PROPERLY MADE ON RETURN OF THE WRIT.

That the respondents resisted the issuance of the writ, is immaterial as respects the right to make and have considered upon its merits the present motion, because this motion is independent of, and unlimited by, any proceedings that have taken place prior to the return of the writ. If respondents unsuccessfully resisted the issuance of the

writ (and certainly in no manner consented to such issuance), the right to move to quash after the return is in no degree abridged. In the regular course of pleading and practice, this term of the court, to which the writ was returned, is the first time this motion could be presented.

Likewise, the right to make and have the motion considered is unabridged by the fact that no motion to supersede was presented by respondents.

Respondents could not have made this motion before the year (or any shorter period) expired within which the petitioners might have perfected an appeal.

As to the last suggestion of petitioners under head I of their brief, that the subject of review by *certiorari* or appeal is merely a matter of method, and that if the court should be of opinion that this is not a proper case for *certiorari*, the court might well treat the case as upon appeal, respondents maintain (1) that a *certiorari* cannot be turned into an appeal after the period within which an appeal can be perfected has expired; and (2) that, since the act of March 3, 1891, establishing the circuit courts of appeals, wherein provision for and limitation upon appeals from and writs of error to decrees or judgments in those courts are defined, and providing by way of exception (Section 6) that in any such case as is thereinbefore "made final it shall be competent for the Supreme Court to require by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court," the course by which review shall or may be obtained is not merely method, but is vital. In other words, the act creating the Circuit Courts of Appeals it-

self sets the bounds to appeals and writs of error from or to those courts and provides opportunity for writs of *certiorari* only where the case is "final" in those courts. Respondent's position upon this subject is further fortified by considering the avowed object of the establishment of the Circuit Courts of Appeals—to relieve the Supreme Court.

See, already cited in respondents' brief to the motion to quash:

American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S., 372.

The regular time for making the motion to quash is upon the return of the writ. Such motion is not entertained before the return.

4 Ency. Pl. and Prac., 248.

> "An *allocatur* upon notice would not preclude respondent from moving to quash the writ, upon the ground of irregularity, or upon any ground of a merely dilatory or technical character. But in such case we should require him to take his exceptions upon the return of the writ, or at his earliest opportunity, and not lie by until the cause came on to be heard upon the merits. But where the exception goes to the jurisdiction of the court, or strikes at the remedy, showing that the plaintiff is not entitled to it, or that, upon sound principles of law, the writ ought not to have been allowed, it is never too late, while the matter is *in fieri*, for the court to interpose and quash the writ. Nay, the court may do this, *ex mero motu*, whenever, in the progress of the cause, they discover facts which, if they had been disclosed on the application for the writ, would have induced the court to have refused an *allocatur*."
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> *Haines* v. *Campion*, 18 N. J. L., 49.

See, also:

The People v. *Common Council of Utica*, 65 Barb., 9 (22).

Ewing v. *Filley et al.*, 43 Pa. St., 384.

So, generally speaking, where the petitioner for the writ had a remedy by appeal, the writ will be quashed, although duly issued.

Farrell v. *Taylor*, 12 Mich., 113.

4 Ency. Pl. & Pr., 238.

II.

THE DECREE IN THE CIRCUIT COURT OF APPEALS BEING REVIEWABLE BY APPEAL OR WRIT OF ERROR IN THIS COURT, CERTIORARI IS NOT PROPER FOR PURPOSE OF REVIEW.

In their objections filed herein to the issuance of the writ of *certiorari*, these respondents set forth the proceedings, orders and facts in this case in the District Court (pp. 2-9), and as shown in the said objections and in the brief of the petitioners now filed in opposition to the motion to quash, the receiver, afterwards trustee, claimed actual possession and title of and in the property involved. The present petitioners, the National Storage Company and other parties, claimed rights and interests in the same property, and claimed that the Storage Company was and had been in the actual possession, and the present petitioners claimed rights in the said property in the way of liens by virtue of certain so-called storage warrants or warehouse receipts, that had been issued by the Storage Company to the bankrupt and by him endorsed to the petitioners prior to the proceedings in bankruptcy. The petitioners and the Storage Company at one time objected

to the jurisdiction of the District Court, without stating any specific grounds for such objection, but at the same time set forth their independent claims in full. After a certain amount of evidence had been taken by the referee on reference to him for the purpose, his report was filed, and the order of the District Court of August 5, 1901, was entered. In said order the court recited that it had jurisdiction and possession of the property, and "it further appearing to the court, on the advice of counsel of the parties hereto in court, that now is the best and most advantageous time to sell the seed in question, all parties being in open court, and on the stipulation of" attorney for the petitioner, First National Bank, made in open court, the court ordered sale of the property, proceeds to be subject to the further order of the court. (Rec., 55.)

From this order of August 5, 1901, holding adversely to them as to jurisdiction, the present petitioners did not appeal to the Supreme Court under Section 5 of the Circuit Courts of Appeals Act of 1891, nor to the Court of Appeals, as has been done in several cases; nor did they petition for review under Section 24 of the Bankruptcy Act. After the property was sold and report of sale made to the court, the petitioner, the First National Bank, filed its petition, in which it set forth certain indebtedness due it from the bankrupt and the delivery of the so-called warehouse receipts as security therefor, by virtue of which it claimed an equitable lien (Rec., 70), as afterwards amended on the hearing, a lien (Rec., 114), on the proceeds of sale, and prayed that its claim might be allowed and satisfied and paid out of the moneys on deposit, etc. H. W. Rogers & Bro. also filed their petition, alleging an indebtedness of the bankrupt to them, and the delivery of warehouse receipts as security, and asked a rule on the

trustee to show cause "why an order should not be entered herein directing the payment to your petitioners of the amount of said note, principal and interest, according to the terms thereof, out of the proceeds of the sale of said seed," and prayed for "such other and further or different relief in the premises as the nature of the case may require and as to equity shall seem meet." (Rec., 80-83.) The Storage Company also filed its petition, setting up its claim to possession, control and asking relief (Rec., 100). All of these parties sought the jurisdiction of the court, praying affirmative relief. One Frank E. Winans, who had also filed answers to the receiver's petition early in the proceedings, claiming a carload of seed belonging to him as owner (Rec., 7, 22), also filed his answer to the petitions of the bank and Rogers & Bro., again setting up his claim to a carload of seed (Rec., 97).

Neither the petitioners nor the Storage Company filed their claims for allowance as debts or claims, under Section 57 of the Bankruptcy Act, and the final decree entered in the case was entered upon the petitions of these parties, as well as upon the petitions theretofore filed.

So we may disregard the petitions filed prior to the determination by the District Court August 5, 1901, holding that it had jurisdiction and possession of the *res*, and take the controversies made by the petitioners here, who filed their claims for liens and preferences upon the proceeds of the sale. The petitioners thus sought, on the same allegations that they had set up in their several answers to the petition of the receiver, to be paid their alleged liens and claims and preferences, the same as they had before sought to have the property surrendered to them. They thus positively invoked the full exercise of the jurisdiction of the court.

Under certain circumstances, the litigation would have fallen in the state courts, but the character of the controversy is not altered by the simple fact that the proceedings continued in the District Court.

Considering the whole record, we conceive the case of *Hewit* v. *Berlin Machine Works,* 194 U. S., 296, to be in point for the present case. See, also:

Jaquith v. *Rowley,* 188 U. S., 620.

The consent necessary is to the tribunal, and not to the form of procedure. And in the District Court, the petitioners do not state whether they objected to the tribunal or to the form. So where a party appears and maintains the *bona fides* of the transfer, on a full hearing, answers on the merits and the like, he will be held to have consented.

In re Steurer, 104 Fed., 976.
Bryan v. *Bernheimer,* 181 U. S., 188.
Hicks v. *Knost,* 178 U. S., 241.
Booneville National Bank v. *Blakey,* 107 Fed., 891.

Consent is not a matter of words, so much as acts, as is well shown in *Booneville National Bank* v. *Blakey, supra.*

In the case of *Louisville Trust Co.* v. *Cominger,* 184 U. S., 18, cited by petitioners, the defendant contested to the end that the District Court was without jurisdiction, asked no affirmative relief, and preserved his rights under that objection. So in the case of *In re Beaudine,* 101 Fed., 574, it would appear that the adverse party, who was ruled to show cause, by way of a demurrer, objected that the court had no jurisdiction, that the rights of the parties could not be determined summarily upon petition,

and that the trustee had no title. Upon the District Court overruling the demurrer and ordering the defendant to answer, it appears that the case was at once taken up by petition for review.

The substance of the argument of petitioners is that "if the claim of the petitioners and the Storage Company were sustained, the court was without jurisdiction to sell, because without possession of the property to be sold. * * * What, in this state of the case, if there had been no sale, would have been the proper action for the District Court to have taken? Clearly an order to return the property to the possession of the adverse claimants." And, the property having been sold, petitioners then ask, "Does this change the situation? Clearly not. The money stood in lieu of the property, and, when the District Court finally decided the possession to be in the adverse claimant, the only order it could properly make was an order returning the money, as it did, to the adverse claimants." (21-22.) This is also the argument of these respondents. August 5, 1901, the court asserted its jurisdiction. Exercising a reasonable discretion, it determined that question in favor of the court, and that decision was never opposed thereafter. The court likewise believed the property in dispute belonged to the trustee, and not to the petitioners, the Storage Company and Winans. This matter, however, the opposing parties concluded to contest further upon the merits. New pleadings were then made, a large amount of evidence taken and the final hearing and decree followed upon all the facts. The court, with jurisdiction and consent of litigants to a full trial, under its view of the facts as to the rights of the parties in and to the property, ordered the property returned to the petitioners and the National

Storage Company, and decided against Winans and the trustee.

The important inquiry then arose to these respondents: Was the District Court mistaken in its conclusion on the facts? The respondents had participated with these petitioners and other adverse parties in the taking of a large amount of testimony as to what the ultimate facts were, and when the court found the facts different from what, in their judgment, the evidence warranted, they sought and obtained an appeal, and secured in the Court of Appeals a reversal of the decree of the District Court. When a decree should be entered in the District Court, in accord with such decree of reversal, it would determine a finding on the facts the reverse of that entered in the District Court from which the appeal had been taken; then, in such state of the case, there would be a determination that the trustee and not the adverse claimants had had possession of and title to the property; and, further, the petitioners having consented to the jurisdiction, there would have been, according to the argument of the petitioners, as well as these respondents, a final determination of a controversy in bankruptcy proceedings.

We cannot conceive of a way in which the adverse parties or proposed defendants could more certainly and unequivocally consent to the exercise of jurisdiction by the court than they did in this case, unless they should file an express written consent to be sued, or procure an order to be entered to that effect.

As stated, the final decree in the District Court was decided upon the petitions of the receiver, afterwards trustee, the petitions of the bank, Rogers & Bro., the Storage Company and Frank E. Winans, and upon the answers to the said several petitions and upon report of the

referee, the evidence, etc. (Rec., 114). After directing relief to the petitioners and the Storage Company, the decree dismissed the petition of Winans "and any and all other petitions filed in said cause, claiming any right or lien on any portion of the property described in the foregoing petitions and storage warrants, and not theretofore disposed of." (Rec., 116.)

The force of section 23b of the Bankruptcy Act is that the trustee shall not, by initiative proceedings, compel parties having adverse interests, to litigate in the district court where there are not jurisdictional grounds to sustain the action in that forum, unless the defendants, that is, parties having adverse interests, consent, or unless they voluntarily come into that court and litigate upon the merits, and thereby consent. The petitioners and the storage company and Winans were defendants to the original petition of the receiver, who afterwards was trustee from July 3rd, 1901, and they became cross-complainants by filing in September, 1901, their petitions for affirmative relief after the sale. Under these circumstances, they consented to the jurisdiction and to a full hearing of the controversy.

Hicks v. *Knost*, 178 U. S., 241.
Bardes v. *Bank*, 178 U. S., 522.
In re Steurer, 104 Fed., 976.

As shown in *Mueller* v. *Nugent*, 184 U. S., 1, the proceedings in the District Court, sitting as a court of bankruptcy, may include both a plenary suit and a proceeding in bankruptcy. Of course, so far as the proceeding involves the character of a plenary suit, it is such suit.

It was not necessary for the district court to recite in the final decree that the court had jurisdiction. That had been determined more than a year before. But that

the court exercised jurisdiction and tried a case in the nature of a plenary suit are necessary presumptions, in order that the relief actually granted by the decree may be held to be consistent with the procedings and within the power of the court to enter. Only as the court exercised jurisdiction over a plenary suit, with consent to the tribunal, could it say that it had jurisdiction and grant the relief it did; otherwise it should have declared its want of jurisdiction, and dismissed.

That the property was sold and changed its form, was a mere incident in the course of the case. If, after the sale, petitioners and the storage company intended to question further the jurisdiction, they certainly should have stood unequivocally upon their rights. Instead of doing so, nothing further is ever said as to jurisdiction, no objection is raised, but the petitioners and the storage company file their claims, asking for affirmative relief, setting up the same matters as they had before included in their answers.

District courts, sitting in bankruptcy, have jurisdiction in a proceeding in bankruptcy, wherein adverse interests are presented by parties not theretofore in the proceedings, to determine in the first instance whether the alleged adverse claims of such claimants are colorable or actual. In such matter, the court should proceed in a summary way and not by going into the full merits, or into the merits properly speaking. If, in such summary proceeding, the court finds that the alleged adverse claims are colorable only or not presented in good faith, the court will assert and retain jurisdiction of the property so in its possession. If, on the other hand, the court finds that the adverse claimants have apparent claims, asserted in good faith, then the receiver or trustee should be di-

rected to surrender the property, and the trustee's remedy therefor is by plenary suit in a tribunal having jurisdiction. But if the claimants elect to contest their rights further upon the merits in the district court, after the assertion of jurisdiction in the court, they can consent so to do, and, under section 23 b, waive all question as to jurisdiction.

Mueller v. *Nugent*, 184 U. S., 1.

Louisville Trust Co. v. *Cominger*, 184 U. S., 293.

Jaquith v. *Rowley*, 188 U. S., 620.

Hewit v. *Berlin Machine Works*, 194 U. S., 296.

Petitioners have contended that the proceedings in the district court retained the character of proceedings in bankruptcy because the petitioners made objection, or did not give consent, to the jurisdiction of the court to try a "controversy;" and, as respondents understand, petitioners admit that, with such consent given by them, the proceedings would have taken on the character of such a controversy. The proceedings in the district court certainly took the substantial form of such a controversy, and the court, in its orders and decrees, asserted full jurisdiction. It was competent for petitioners to consent to a real controversy in bankruptcy proceedings. As they submitted, without objection, to an appeal, which raised the whole case, and reviewed it as a controversy or plenary suit, they solemnly admitted that the proceedings in the district court were, what respondents claim they were, and what the Court of Appeals considered them to be,—namely, a plenary suit, tried with consent.

In such state of the record, the decree of reversal in the Circuit court of Appeals would not be final, within the definition of the Act of 1891, establishing the Circuit

Courts of Appeals, but would be reviewable by appeal or writ or error in this Court.

Though all United States Courts, except the Supreme Court, may be and are described as inferior courts, yet the district courts, as courts of bankruptcy, are not inferior courts in the sense that jurisdiction must necessarily appear on the face of the record.

McCormick v. *Sullivant*, 10 Wheat., 199.
Kennedy v. *Bank*, 8 How., 586 (611).

The rule has been strictly adhered to in the United States Courts, that want of jurisdiction is a question that the courts should consider whenever or wherever raised, even if the parties forbear to make it or consent that the case may be heard on its merits. This applies especially where the jurisdiction of the trial court depends upon diversity of citizenship, etc. But where, as by section 23b, parties may consent, this rule cannot apply in its usual strictness. And so, in view of the same section, the rule of the Federal Courts that a party does not waive his formal plea or motion as to want of jurisdiction, by proceeding to a hearing on the merits, does not have its former force in these cases, but the objection to the jurisdiction may be waived.

These respondents carried the case by appeal to the Circuit Court of Appeals and obtained a review on questions of both fact and law. It was competent for the opposite parties to consent that an appealable case should be heard in the district court. We think that the following cases indicate that the appeal was properly heard in the Circuit Court of Appeals:

Elliott v. *Toeppner*, 187 U. S., 327.
Duncan v. *Landis*, 106 Fed., 839.
Booneville National Bank v. *Blakey*, *supra*.

If a case has thus been properly heard in the Court of Appeals on controverted questions of fact and law, by an appeal, as in equity cases, the decision will not be final within the meaning of the Act of 1891, referred to, and if not final is reviewable by appeal or writ of error in the Supreme Court.

In conclusion, respondents maintain that the decision of the Circuit Court of Appeals being reviewable in this court by appeal or writ of error, the writ of *certiorari* should be quashed.

Respectfully submitted,

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